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In The

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTEREST OF AMICI CURIAE

Amici are law professors whose teaching and scholarship involve the fields of alternative dispute resolution, employment and employment discrimination law, labor law, and civil procedure.[1] Having studied the history and fundamental principles that underlie mandatory arbitration doctrine, and the application of the Federal Arbitration Act to employment cases in particular, amici are concerned about the lack of clear principles surrounding lower-court interpretations of the exclusion clause in § 1 of the Act, which excludes from the FAA's coverage "contracts of employment of seamen, railroad employees, and any other class of worker engaged in foreign or interstate commerce." 9 U.S.C. § 1. The narrow interpretation of the § 1 exclusion, holding that it applies only to "transportation workers," muddles the relevant history of congressional invocations of the commerce clause. It subordinates congressional intent to a dubious principle of statutory construction, one never endorsed by this Court, that in effect the FAA must be interpreted to expand the use of mandatory arbitration as much as possible. Amici believe that an intellectually honest interpretation of the § 1 exclusion, one that is faithful to congressional intent and that gives due regard to historical context, compels the conclusion that the FAA was never intended to apply to employment contracts of any kind.[2]

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part and no person other than amici or their counsel have made a monetary contribution to the preparation or submission of this brief.

[2] Amici's position reflects the consensus of scholarship studying the FAA. *See, e.g.*, Richard A. Epstein, *Fidelity Without Translation*, 1 Green Bag 2d 21, 27-29 (1997); Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An*

SUMMARY OF ARGUMENT

Congress did not intend the FAA to cover employment contracts at all, and wrote § 1 to exclude all employment contracts that could be reached under the fullest extent of the commerce power, as understood in 1925. The legislative history confirms this. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) requires that that congressional intent – rather than some mechanical application of the 1925 language – be respected in contemporary interpretation. Therefore, the § 1 exclusion should be interpreted to reach all employment contracts regulable

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Essay in Historical Clarification, 17 Berkeley J. Emp. & Lab. L. 282, 284-88 (1997); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 Hofstra Lab. L. J. 1, 19 (1996); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 U.C.L.A. L. Rev. 949 (2000); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33, 76-80; Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. Disp. Resol. 259; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 Tul. L. Rev. 1, 19-20 (1997). *See also* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. Rev. 931, 993 (1999) (FAA not intended to apply to arbitrations between persons engaged in common trade/members of trade association and "outsiders").

Professor Samuel Estreicher, counsel for petitioner in this case, is the most prominent academic advocate for the application of the FAA to employment disputes. Yet even he candidly acknowledges that a "difficulty with the 'transportation industry only' reading is the absence of evidence that such a limitation reflects a discernible purpose of Congress." Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U.L. Rev. 1344, 1368 (1997).

as interstate commerce, even though that category is much broader today than it was in 1925.[3]

The narrow, "transportation workers" interpretation in vogue in the lower courts, is not only strained and inconsistently applied, but also conflicts with federalism principles, which disfavor the displacement of traditional areas of state law, such as employment, absent clear congressional intent to preempt. Finally, the question whether to extend mandatory arbitration under the FAA to employment claims raises numerous, conflicting policy considerations, which Congress in 1925 decided to avoid by exempting employment contracts from the FAA. These policy concerns, which have only become more complex since 1925, are best addressed by legislatures, not the courts, in the first instance.

ARGUMENT

I. A BROAD INTERPRETATION OF THE § 1 EXCLUSION, EXEMPTING ALL EMPLOYMENT CONTRACTS FROM FAA COVERAGE, IS THE ONE MOST CONSISTENT WITH THE STATUTORY LANGUAGE, THE INTENT OF CONGRESS AND MODERN COMMERCE CLAUSE DOCTRINE

Section 1 of the FAA provides: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate commerce*." 9 U.S.C. § 1 (emphasis added). The task of interpreting the italicized language, "le[ft] for another day" in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991), may be complicated by the expansion of the commerce power

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[3] The FAA's exclusion of all contracts of employment has no impact on the enforcement of arbitration provisions in collective bargaining agreements, because those are enforced under § 301 of the Labor Management Relations Act, rather than the FAA. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

since 1937; but it is not complicated that much. In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), this Court outlined a straightforward and intellectually honest approach to construing the commerce-related language in the FAA: the touchstone is congressional intent. Just as Congress in 1925 intended the FAA to apply to all transactions that could be reached under the commerce clause, *id.*, so too Congress intended to *exclude* all *employment contracts* that could be reached under the commerce clause.

A. *Allied-Bruce* Mandates that the Original Congressional Intent to Exclude *All* Employment Contracts from the FAA Be Respected by Interpreting the § 1 Exclusion Broadly to Include all Employment Contracts Reachable Under the Commerce Power Today

In *Allied-Bruce*, this Court examined the scope of § 2 of the FAA, providing for enforcement of arbitration agreements in "a contract evidencing a transaction involving commerce[.]" 9 U.S.C. § 2. While recognizing that "[t]he pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out," 513 U.S. at 275, the opinion noted that "it is not unusual for this Court in similar circumstances to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively[.]" *Id.*

Allied-Bruce did not simplistically hang modern jurisprudential definitions of the "commerce" language onto the 1925 wording; nor did it rigidly limit the commerce language to its 1925 contours. Implicitly eschewing both those approaches, the Court carefully analyzed the intent of the 1925 Congress in enacting the FAA, finding that intent to be "expansive," 513 U.S. at 274, and concluding that the phrase "involving commerce" signified a congressional intent "to exercise [its] commerce power to the

full." *Id.* at 277. This fully expansive congressional intent dictated the conclusion that § 2 of the FAA applies to arbitration agreements in any "transaction" that can be reached by the commerce clause as now understood.

Allied-Bruce thus tells us how to resolve this case: first, determine the congressional intent behind the "contracts of employment" exclusion in § 1, and then translate that *intent* – rather than the words in the abstract – into modern commerce-clause doctrine. As shown below, the § 1 exclusion was intended in 1925 to apply to all employment contracts that could be regulated by Congress under the commerce clause; accordingly, the correct interpretation is to apply the exclusion to all employment contracts that can be regulated by the commerce clause today.

Petitioner appears to advocate the two approaches implicitly *rejected* in *Allied-Bruce*. Petitioner first suggests that the FAA's commerce-invoking phrases be given their modern meaning, with "engaged in commerce" construed more narrowly than "involving commerce." Pet. Br. at 14-16. Yet petitioner also argues that the phrase "engaged in commerce" must be given the extremely narrow scope petitioner says Congress intended in 1925, without regard to post-1937 expansion of the commerce power. Pet. Br. at 19-24.

Petitioner's two suggested approaches conflict not only with *Allied-Bruce*, but also with one another. This Court has defined "engaged in commerce," post 1937, to encompass "persons or activities within the flow of interstate commerce – the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974); *see Allied-Bruce*, 513 U.S. at 273.[4] Under this construction,

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[4] "Engaged in commerce" is not legally distinct from "in commerce." Interpreting other statutes, such as the Clayton Act, 15 U.S.C. § 12, this Court has disregarded the word "engaged" and focused on the term of art "in commerce." *See, e.g., Gulf Oil*

workers "engaged in foreign and interstate commerce" would include not only transportation workers, but also the far more numerous categories of workers producing goods and services for interstate consumption, and those employed in retail of such goods. The modern definition of "engaged in commerce" is thus far more extensive than the "transportation workers" interpretation which petitioner, in the end, advocates. Yet petitioner never explains why the modern meaning of "engaged in commerce" should be disregarded. In any event, neither of petitioner's suggested approaches are consistent with *Allied-Bruce*, because both would allow a substantial range of employment contracts to be covered by the FAA when it was the intent of Congress in enacting the FAA to exclude all employment contracts.[5]

B. Congress Intended to Exclude from FAA Coverage All Contracts of Employment that Could Forseeably Come Within the Federal Commerce Power

The § 1 exclusion was intended to – and did – exempt from the FAA all employment contracts that could be reached by federal law under the commerce clause. Were Congress drafting a broadly-inclusive "employment contracts" exclusion today, the language might look quite

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Corp v. Copp Paving Co., 419 U.S. 186, 195 (1974). Petitioner does not contend that "in commerce" differs from "engaged in commerce."

[5] The "transportation workers" interpretation likewise adds needless complexity to the statute by creating a third test, lying somewhere beyond "affecting commerce" and "in commerce," "thereby unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it." *Allied-Bruce*, 513 U.S. at 275 (rejecting interpretation of "involving commerce" in § 2 that "would create a new, unfamiliar test lying somewhere in a no-man's land between 'in commerce' and 'affecting commerce' ").

different from what was employed in the 1925 statute. But in 1925, congressional commerce authority over the employment relationship was *exceedingly narrow*: Congress could regulate only those employees "engaged in foreign or interstate commerce." Thus, in 1925 terms, the FAA's employment contracts exclusion was as broad as could be.

1. The Plain Language of § 1 Shows Congress' Intent to Exclude All Contracts of Employment from the FAA

The plain meaning of the § 1 exclusion is the first place to look for Congress' intent. Petitioner concurs that this case is one of "plain meaning of the statutory text." Pet. Br. at 24, heading C; *see id.* at 24 ("when the statutory text is clear, as in the FAA, resort to legislative history is unnecessary"). The question is how to interpret the phrase "engaged in foreign or interstate commerce." While commerce-invoking language has become "words of art" since 1937, there is no indication that such was the case in 1925. "Engaged" means "occupied; employed[.]" Webster's Third New Int'l Dict. 751 (1963); *accord* 1 The New Century Dictionary of the English Language 500 (1927) ("busy or occupied; involved"). Section 1 defines "commerce" as "commerce among the several States or with foreign nations . . . " 9 U.S.C. § 1. Therefore, § 1 excludes from the FAA all contracts of employment of persons employed or occupied in commerce among the several states.

Petitioner asks whether that language, *if written today*, would cover all employment contracts. But that is the wrong question. The proper question is whether *in 1925*, when the statute was enacted, the § 1 exclusion covered all employment contracts. It did.

2. The § 1 Exclusion Encompassed the Entire Range of Employment Contracts Congress Could Have Regulated in 1925

From the turn of the 20th century until 1937, the Supreme Court repeatedly limited federal authority to legislate the terms and conditions of employment. Most employment contracts were held to fall outside Congress' commerce power, which did not reach "manufacturing," "production" and other "local" activities. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 303-04 (1936) (striking down federal wage and hour regulations of coal miners). In *Hammer v. Dagenhart*, 247 U.S. 251 (1918), for example, the Court struck down Congress' attempt to regulate working hours of children, holding that regulation of terms and conditions of employment in "local trades and manufacture" was reserved to the "police power" of the states and excluded from the federal commerce power. *Id.* at 274.

Congressional power to regulate the employment relationship was narrower than its scope of authority over business transactions. Business transactions to buy and sell that were "incident to" the "current" of commerce could be regulated. *See Stafford v. Wallace*, 258 U.S. 495, 516 (1922) (upholding regulation of stockyard transactions which "cannot be separated from the [interstate] movement to which they contribute and necessarily take on its character"). But in marked contrast to such business transactions, which might be said to "involve"or "relate to" interstate commerce, *see* FAA § 2 ("transaction *involving* commerce"); H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924) ("control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts *relating to* interstate commerce"), the Supreme Court's commerce cases on *employment* allowed Congress to regulate only those workers "engaged in" interstate commerce.

Congress' attempts to enact workers' compensation legislation is instructive. In 1906, Congress enacted the

first version of the statute, eventually known as the Federal Employers' Liability Act (FELA), governing liability "in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee[.]" 34 Stat. 232. In the first *Employers' Liability Cases*, 207 U.S. 463 (1907), the Court struck down the statute as exceeding Congress' commerce clause power. Although Congress was deemed to have the authority "to regulate the relation of master and servant, to the extent that [such] regulations . . . are solely confined to interstate commerce," 207 U.S. at 495, the Court concluded that Congress had unconstitutionally overreached this limit by writing a statute that could be read to apply to *intra*state activities of the employees of *inter*state carriers. *Id.* at 498-99. Significantly, the Court refused the suggestion that it apply a saving construction to the statute that would have limited its application to "any employee *when engaged in* interstate commerce," language the Court indicated it would have upheld. *Id.* at 501 (emphasis added).

In April 1908, Congress enacted a revised FELA statute, adopting the limiting language suggested by the Court in the *Employers' Liability Cases*: "Every common carrier by railroad *while engaging in commerce between any of the several States* . . . shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce*[.]" 45 U.S.C. § 51, 35 Stat. 65 (1908). This statute was upheld in the *Second Employers' Liability Cases*, 223 U.S. 1, 51-52 (1912).

Petitioner argues, anachronistically, that the FELA cases establish that even in 1925, the phrase "engaged in commerce" was understood to mean something less than the full reach of Congress' commerce power *over employment*. Pet. Br. at 18. But petitioner misreads the cases. Shortly after the first *Employers' Liability Cases*, the Court relaxed its position on commerce power from the view that regulation was permissible only *while* an employee was *actually engaging in commerce* to the slightly less restrictive view that Congress could regulate certain aspects of employment of workers whose "intrastate"

and "interstate" duties were inextricably "interwoven." *Baltimore & Ohio R. Co. v. ICC*, 221 U.S. 612, 618 (1911) (upholding regulation of working hours, on safety grounds, of railroad operators with interstate and intrastate functions); *Ill. Central R. Co. v. Behrens*, 233 U.S. 473, 477 (1914) (dictum) (commerce authority to regulate railroad switching crew not limited to their work "while engaging in commerce" given "practical difficulty in separating or dividing" their interstate and intrastate work). Such workers with "interwoven" functions were deemed sufficiently engaged in commerce to be subject to commerce clause regulation – at least where a safety statute was concerned. The message of the FELA cases was that "*while* engaging in commerce" meant less than the full reach of commerce power over employment, whereas "engaged in commerce" meant the full reach.

Petitioner blurs this distinction by quoting incompletely from *Shanks v. Delaware, L. & W. R. Co.*, 239 U.S. 556 (1916). There the court construed the FELA "while engaging in" language to mean that FELA applied if the employee, "*at the time of the injury*, [was] engaged in interstate transportation[.]" *Id. at* 558 (emphasis added). Petitioner, omitting the italicized phrase, creates the misperception that the *Shanks* court construed "while engaging in" to be synonymous with "engaged in." Pet. Br. at 18.

Only a narrow slice of the employment relationship could be regulated under the "full reach" of the commerce clause in the pre-New Deal era. The FELA cases signaled that Congress could constitutionally regulate only *interstate activities* of an employee – or the "interwoven" activities of employees with inter- and intra-state functions. Similarly, regulation of working hours was upheld against a commerce challenge on the grounds that it promoted safety of interstate travel. *See Baltimore & Ohio*, 221 U.S. at 618-19. But other aspects of the employment relation, even of workers "engaged in commerce," were still deemed "local" and therefore outside the commerce power. Thus, in *Adair v. United States*, 208 U.S. 161,

178-79 (1908), the Court struck down a federal law prohibiting anti-union "yellow dog" agreements in employment contracts of railroad workers, concluding that there was no "possible legal or logical connection . . . between an employee's membership in a labor organization and the carrying on of interstate commerce[.]" *Id.* at 178; *see Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 374 (1935) (commerce power did not extend to retirement benefits for railroad workers). While wartime wage regulation of railroad workers was upheld in *Wilson v. New*, 243 U.S. 332 (1917), the Court later contended that this was merely a "temporary measure" that was "passed to meet a sudden and great emergency." *Adkins v. Children's Hospital*, 261 U.S. 525, 551 (1923). Even the constitutionality of an arbitration statute for railroad employees was an open question. *See Adair*, 208 U.S. at 180.

Given the uncertainty surrounding the extent of power over employment relations, the employment contracts exclusion in § 1 of the FAA was at least as broad, and arguably broader, than the prevailing scope of federal regulation of employment contracts. The FAA language applied to *all* railroad employees, and any other class of worker "engaged in" – not "while engaging in" – interstate commerce. This language indicated an intent to make the exclusion as broad and comprehensive as possible. The unqualified reference to "railroad employees" was broad enough to include purely intrastate employees and would thus accommodate foreseeable expansion of congressional authority to regulate such employees. Indeed, that language seems to have anticipated *Texas & New Orleans R. Co. v. Bhd. of Ry. and Steamship Clerks*, 281 U.S. 548, 570 (1930), in which the Court quietly abandoned the "interstate functions" limitation by recognizing congressional power to regulate union activity for all railroad employees, including intrastate clerks. The phrase "any other class of workers" was, in the legal climate of 1925, a catchall provision designed to be elastic and expansive, rather than restrictive.

Petitioner, and most lower courts, have assumed that Congress meant the § 1 exclusion to set an outer limit at transportation workers, irrespective of any subsequent expansion of the scope of the commerce clause. Yet, it borders on historical absurdity to suggest that Congress would have written the FAA in the way it did if it had any intention of *including any* employment contracts. Congress' power to regulate the employment contracts of workers other than those directly engaged in interstate commerce was so much in doubt, and an attempt to do so would have been so radical a departure from prevailing legislative practice, that one would expect to see statutory language at least attempting to grapple with the restrictive commerce clause doctrine by carefully defining what employment contracts would be covered by the FAA. Congress was well aware that the Supreme Court both placed strict constitutional limits on the regulation of the employment relationship *and* refused to construe statutes flexibly in order to save them from unconstitutionality. Accordingly, Congress would not have relied upon the vaguely implied residuum of a broadly-worded *exclusionary* clause as a way of defining a class of employment contracts to be *included* in the statute. As seen in the *Employers' Liability Cases*, the Court required precise, affirmative definitions of legislative categories of employers and employees, making explicit their connections to commerce. And Congress adhered to that requirement in drafting statutes of that era. *See, e.g.*, Railway Labor Act, 45 U.S.C. § 151, 44 Stat. 577 (1926) (containing lengthy definitions of both "employer" and "employee" showing connection to commerce); Act of March 4, 1907, 34 Stat. 1415-16 (defining "employees" as "persons actually engaged in or connected with the movement of any train").

In sum, Congress had reason to believe in 1925 that it could not, under the commerce clause, have extended the FAA to any employment contracts if it had wanted to. In any case, Congress didn't want to – and readily made

that plain by extending the § 1 exclusion to the full reach of its commerce power *over employment contracts*.

C. The Legislative History Further Demonstrates that the FAA Was Not Intended to Cover *Any* Employment Contracts

"[T]here is little dispute that the primary concern animating the FAA was the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities." *Gilmer*, 500 U.S. at 39 (Stevens, J., dissenting). The FAA's legislative history is filled with statements that the purpose of the act is to settle disputes between "businessmen." *See, e.g.*, Joint Hearings on S. 1005 and H.R. 646, Subcomms. of Comms. on Judiciary, 68th Cong., 1st Sess., 18 (1924) (statement of Julius H. Cohen) (act drafted "for businessmen"); Schwartz, *supra* note 2, at 77-78. The FAA's drafters were in tune with the Supreme Court's severe restrictions on employment regulation: the bill, according to W.H.H. Piatt (chairman of the ABA committee which drafted it) was "not intended [to] be an act referring to labor disputes at all," but rather "is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this." Hearing on S. 4213 and S. 4214 before the Subcomm. of the Senate Comm. on the Judiciary, 67th Cong, 4th Sess. 7, 9 (1923) (hereinafter "*Senate Hearings*") (emphasis added).

Nevertheless, when the original version of the arbitration bill was introduced into the Senate and House in late December 1922, H.R. 13522, 67th Cong., 4th Sess. (1922), it came to the attention of Andrew Furuseth, President of the International Seamen's Union (ISU), who promptly prepared an analysis opposing the bill and presented it to the ISU on January 13, 1923. *See* Finkin, *supra* note 2, at 284-88. While Furuseth worried that boilerplate arbitration clauses in individual seamen's

employment contracts would be specifically enforced, he also criticized the arbitration bill on the broader ground that it would force all sorts of employees, through individual adhesion contracts, to forfeit the protection of the courts. *Id.* at 301 (reprinting Furuseth's report on the arbitration bill); *see also Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 467 & n.2 (1957) (Frankfurter, J., dissenting) (noting Furuseth's opposition to what he perceived would be "the effect of the [FAA] on individual contracts" as well as collective agreements). Consequently, the ISU joined the American Federation of Labor in resolving to "prevent[ ] the enactment of any measure designed to fasten any species of compulsory arbitration *upon any group of workers in America*." Finkin, *supra* note 2, at 289 (quoting ISU proceedings).

Furuseth's concern about the act's application to adhesive employment contracts was echoed at the Senate subcommittee hearings on January 31, 1923:

> The trouble about the matter is that a great many of these contracts that are entered into are really not voluntar[y] things at all. Take an insurance policy. . . . It is the same with a good many contracts of employment. A man says, "These are our terms. All right, take it or leave it." Well there is nothing for the man to do except to sign it and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Senate Hearings at 9 (1923) (remarks of Sen. Walsh).

The language that ultimately became the § 1 exclusion was a belt-and-suspenders operation to provide reassurance – redundant, in the proponents' views – that employment contracts would not be covered by the Act. At the January 31 Senate subcommittee hearing, Piatt responded to Furuseth's objection by stating that

> It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest that in as far as the committee is concerned,

> *if your honorable committee should feel that there is any danger of that*, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce."

Id. (emphasis added). That day, Secretary of Commerce Herbert Hoover likewise proposed the wording that was ultimately adopted as the § 1 exclusion; Hoover suggested it be added "[i]f the objection appears to the inclusion of workers' contracts in the law's scheme[.]" Hoover Letter of January 31, 1923, reprinted in *Senate Hearings*, at 14; *see* Finkin, *supra* note 2, at 285 (describing response of arbitration bill's supporters to employment contracts issue). "In sum, almost immediately after the bill was offered, the status of 'workers contracts' under it became an issue that was with equal alacrity rendered moot for the elemental reason that the bill's proponents had drafted and were pressing a commercial arbitration law wholly unconcerned with employment." Matthew W. Finkin, *Employment Contracts Under the FAA – Reconsidered*, 48 Lab. L. J. 329, 330 (1997).

D. The Canons of Construction Fail to Support the "Transportation Workers" Interpretation

Petitioner and the "transportation workers" decisions rely heavily on certain canons of statutory construction. No one explains why such interpretive aids are needed in what petitioner agrees is a plain language case. Even so, none of the "canon" arguments even supports the narrow interpretation.

1. "Ejusdem generis"

"Ejusdem generis," "[o]rdinarily . . . limits general terms which follow specific ones to matters similar to those specified[.]" *Gooch v. United States*, 297 U.S. 124, 128 (1936). Petitioner argues that "workers engaged in interstate or foreign commerce" is a general term that must take its meaning from the purported "list" of types of

employee who are "actually engaged in the movement of interstate or foreign commerce." Pet. Br. at 21. Since it was first advanced in *Tenney Engineering v. United Electrical, Radio and Machine Workers*, 207 F.2d 450, 452 (3d Cir. 1953), this ill-conceived argument has been uncritically accepted by most of the lower courts adopting the transportation workers interpretation. *See, e.g., Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1470 (D.C. Cir. 1997); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 598 (6th Cir. 1995).

Canons do not compel a particular statutory interpretation, but "simply answer the question whether a particular meaning is linguistically permissible, if the context warrants it." Henry Hart and Albert Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1191 (Eskridge & Frickey ed. 1994) (emphasis in original). The "ejusdem generis" canon "may not be used to defeat the obvious purpose of legislation." *Gooch*, 297 U.S. at 128. In *Gooch* itself, this Court rejected a "ejusdem generis" argument, after finding the answer in the language of the statute as clarified by its legislative history. *See id.* Here, likewise, ejusdem generis does not supply a persuasive reason to depart from the meaning of "engaged in commerce" that would have been plain to Congress in 1925.

Moreover, ejusdem generis can support either the broad or narrow interpretation. The argument that "workers engaged in . . . commerce" means "transportation workers" depends on an arbitrarily narrow characterization of the other items in the list. To be sure, seamen and railroad workers can be categorized as "transportation workers." But they can also be categorized as "employees subject to congressional authority." Thus, ejusdem generis also supports the interpretation offered here that "workers engaged in . . . commerce" was meant to apply to all employees subject to the commerce power.

2. The "Anti-Superfluity" Rule

It has similarly been argued that a broad interpretation of "any other class of workers" would render "superfluous" the preceding enumeration of "seamen" and "railroad employees." *Cole*, 105 F.3d at 1470; *accord Rojas v. TK Communications*, 87 F.3d 745, 748 (5th Cir. 1996); Pet. Br. at 22-23. But defining the "other class of workers" to mean "transportation workers" does not eliminate the supposed "superfluity": on the contrary, that definition too creates overlap with "seamen" and "railroad employees," which, according to petitioner's ejusdem generis argument, are specific examples of transportation workers. Indeed, the "ejusdem generis" and "anti-surplusage" canons contradict each other here. Arguably, this overlap is mitigated by the phrase "any other." But this same point could be made in defense of the broad interpretation – workers engaged in commerce as the equivalent of "employees subject to federal commerce regulation" – which creates no more overlap with "seamen" and "railroad employees" than does the "transportation workers" interpretation. Thus, the "rule against superfluity" equally supports both interpretations.

Furthermore, Congress has a long history of using overlapping phrases in its jurisdictional commerce clause language. The Labor-Management Reporting and Disclosure Act of 1959, for example, defines "industry affecting commerce," to which the act applies, as "any activity, business, or industry [1] in commerce or [2] in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and [3] includes any activity or industry 'affecting commerce' within the meaning of the Labor Management Relations Act, 1947[.]" 29 U.S.C. § 402(c) (bracketed numbers added). A labor dispute in an industry "in commerce" would "hinder or obstruct commerce or the free flow of commerce": therefore, industries "in commerce" are plainly included in the second, broader category. The third category – invoking

the LMRA's definition of "affecting commerce" – is virtually identical with, and therefore perfectly overlaps, the preceding two categories: The LMRA defines "industry affecting commerce" as "any activity, business, or industry in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce." 29 U.S.C. § 142(1). *See also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(h) (defining "industry affecting commerce" in nearly identical terms). Obviously, where, as here, the commerce clause language is intended to list overlapping categories, the "anti-superfluity" rule makes no sense. That "rule" would also dictate that the term "industry" be construed to exclude "business" or "activity," lest those other terms be rendered "superfluous"; that, in turn, would mean that an "industry affecting commerce" would exclude businesses and activities – in direct contradiction of the definition of "industry affecting commerce."

Rather than undertaking the impossible mission of eliminating all overlap in statutory "lists," the more sensible approach to the § 1 exclusion is to recognize that seamen and railroad employees were listed as established examples of employees subject to federal regulation, and the phrase "any other class of workers" was intended to reach the remainder of employees arguably subject to federal regulation. As an historical matter, it is also likely that seamen's contracts were listed separately to reassure Furuseth's union, "railroad employees" were added for good measure at the suggestion of Secretary of Commerce Hoover, whose department regulated railroad employees (and no others); and the phrase "any other class of workers" was added to make the exemption as emphatic and comprehensive as possible.

3. The "Alternative Language" Argument

Some courts support the narrow interpretation by arguing that "[a] broad exclusion of all employment contracts could simply have said 'nothing herein shall pertain to employment contracts.' " *Cole*, 105 F.3d at 1470-71. But it is anachronistic to place great significance on the failure of Congress in 1925 to use a broad reference to "all contracts of employment" that would sound better and plainer to the modern ear. Congressional drafting habits had been shaped by Supreme Court cases signaling that the Court would not rewrite overly broad commerce clause language to save it from unconstitutionality. *See Employers' Liability Cases*, 207 U.S. 463, 501 (1907). Congress would thus be more likely to enumerate the categories of contracts within its regulatory power, rather than use an overly broad reference to all "contracts of employment."

More importantly, Congress' failure to use the proffered broad reference to all "contracts of employment" does not prove the contrary conclusion – that Congress therefore wished to limit the exclusion to transportation workers. Had *that* been the intent, Congress could have said: "any other workers *actually engaged in interstate transportation*" or "*employed by common carriers*" or "*persons actually engaged in or connected with the movement of passengers or property in foreign or interstate commerce.*" By 1925, Congress had long been aware of how to draft language to specify categories of transportation workers. The "Hours of Service" Act (Act of March 4, 1907), 34 Stat. 1415-16, defined "common carrier" as being "engaged in the transportation of passengers or property by railroad" and provided that "the term 'employees' as used in this act, shall be held to mean persons actually engaged in or connected with the movement of any train[.]" The Interstate Commerce Act of 1887, 24 Stat. 379 applied by its terms "to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad; or partly by railroad and partly by

water . . . " The first FELA statute applied to "every common carrier," 34 Stat. 232, and the second to "every common carrier by railroad." 35 Stat. 65. The fact that such familiar language specifying transportation workers was *not* used in FAA § 1 weighs against the "transportation workers" interpretation.

E. The "Transportation Workers" Interpretation is Implausible on its Face

The "transportation workers" interpretation asks us to accept that Congress wrote a statute excluding all employment contracts from FAA coverage in 1925, and yet somehow "intended" that in some foreseeable future circumstances some employment contracts, but not others, would come under the FAA. It does not suffice to say, as a number of courts have, that *in 1925*, the statutory phrase "workers engaged in foreign or interstate commerce" applied only to employees "involved in, or closely related to, the actual movement of goods in interstate commerce". *Dickstein v. Dupont*, 443 F.2d 783, 785 (1st Cir. 1971). That point does not contradict – and indeed supports – the view that "workers engaged in foreign or interstate commerce" defined the full scope of congressional power over employment contracts. The "transportation worker" courts must at a minimum show a congressional intent to regulate a class of employment contracts decidedly smaller than what Congress in 1925 believed it could have regulated.[6]

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[6] Even Professor Estreicher, who advocates mandatory arbitration of employment claims, acknowledges that:

> [A] difficulty with the "transportation industry only" reading is the absence of evidence that such a limitation reflects a discernible purpose of Congress. While it is hard to assume Congress would have any purpose to exclude arbitration agreements signed by highly-placed executives, it is no less difficult to attribute to Congress some purpose for excluding individual employment contracts of seamen, railroad employees, and others directly engaged in interstate shipment of goods while covering individual employment contracts of all others who work for firms subject to its commerce power.

Estreicher, *supra* note 2, at 1368.

Two theories have been ventured by courts troubled by the facial implausibility of such a congressional intention. One suggests that Congress believed it unnecessary to extend the FAA to those workers who already had dispute resolution systems in place. *See Tenney*, 207 F.2d at 452-53; *Asplundh*, 71 F.3d at 598; *see also Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997). Another suggests that seamen and railroad employees were "heavily regulated" by the federal government, while similar "comprehensive" motor carrier regulation seemed imminent. *See Pryner*, 109 F.3d at 358.

Petitioner rejects these theories as "conjecture," "speculat[ion]" and "surmise[ ]." Pet. Br. at 27. Amici agree. Further, the theories are plain wrong. First, they are contradicted by the legislative record. As shown above, the exclusion was added to allay fears from organized labor that the FAA could be construed to apply to any employment contracts, including individual ones. Secretary Hoover proposed that the exclusionary language be added *"[i]f* the objection appears to the inclusion of workers' contracts in the law's scheme[.]" *Senate Hearings* at 14 (emphasis added). There is no indication in the legislative record that "workers contracts" should be excluded because workers already had arbitration. Nor is there any need to speculate about congressional intent when the actual reasons for the exclusion appear in the record.

Second, the statutory language does not fit this theory. In 1925, "other" transportation workers, such as motor carriers, were not covered by any ADR system.

Motor carriers would have been an obvious, major component of "any other class of workers engaged in foreign or interstate commerce" since they were a numerous and high profile sector of employment, whose regulatory status – whether subject to state or federal control – was an active legal and political controversy being played out in the courts and Secretary Hoover's commerce department.[7]

Recognizing this difficulty, Chief Judge Posner shifted the argument and"surmised" (Pet. Br. at 27) that "any other class of workers" meant workers subject to current or foreseeable federal *regulation*. *Pryner*, 109 F.3d at 358. But that simply restates the interpretation offered by amici here: the phrase was meant to encompass all employment contracts subject to *regulation* under the commerce power. It fails to explain any special congressional concern for "transportation workers" to the exclusion of all others who might someday come within the commerce power.

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[7] The number of registered commercial trucks doubled between 1920 and 1924 from over 1 million to more than 2 million. Donald V. Harper, Economic Regulation of the Motor Trucking Industry by the States 4 (1959). At the beginning of 1925, bus companies operated approximately 53,000 buses and employed 125,000 to 150,000 people. John J. George, Motor Carrier Regulation in the United States 2 (1929). A major political conflict was developing in the early 1920s between trucking and rail interests, with the railroads advocating bringing interstate trucking under the control of the Interstate Commerce Commission. *Id.* at 240-44. The law was unsettled about the extent of federal authority over the trucking industry, which resisted federal regulation by arguing that its operations were "primarily local, short-haul" in nature. *Id.* at 220-26, 243-44; *see Buck v. Kuykendall*, 267 U.S. 308 (1923) (holding that dormant commerce clause denied states the power to deny operating certificates to interstate motor carriers).

F. The Apparent Consistency of Lower Courts in Adopting the "Transportation Workers" Interpretation is Illusory

While the Ninth Circuit is the only one to have rejected, currently, the "transportation workers" interpretation for all employment contracts, petitioner oversimplifies greatly by saying that the other circuits "have with almost perfect consistency construed the § 1 exclusion narrowly." Pet. Br. at 31. The circuits adopting the "transportation workers" interpretation of the § 1 exclusion have hardly demonstrated exemplary reasoning or consistency on the issue.

The "transportation workers" decisions have virtually all purported to follow *Tenney*, 207 F.2d 450, and even those that do not cite *Tenney* share its heavy reliance on the "ejusdem generis" argument and its failure to reckon with the legislative history and the historical context of the phrase "engaged in commerce." *Tenney* was one of several cases from the 1950s in which courts "[f]earful that the anti-arbitration premises of state common law would undermine labor arbitration, . . . strove mightily to preserve some role for the FAA in enforcing arbitration promises in collective agreements." Estreicher, *supra* note 2, at 1367. However, this Court's decision in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), which found the authority for enforcement of labor arbitration in LMRA § 301, rather than the FAA, "essentially removed the need for such creative readings." Estreicher, *supra* note 2, at 1367.

The courts of appeals have also taken self-contradictory positions with respect to the § 1 exclusion. Five courts of appeals have failed to adhere to the "transportation workers" interpretation in cases involving collective bargaining agreements (CBAs), holding instead that workers covered by CBAs are "engaged in interstate commerce" regardless of their line of work. *See Posadas de Puerto Rico v. Asociacion de Empleados*, 873 F.2d 479, 482 (1st Cir. 1989); *Domino Sugar v. Sugar Workers Local 392*, 10 F.3d 1064,

1067 (4th Cir. 1993); *Miller v. Public Storage*, 121 F.3d 215, 218 (5th Cir. 1997) (trying to reconcile circuit authority holding § 1 exclusion applies to all CBAs with cases applying "transportation workers" limitation to individual contracts); *Kemner v. Dist. Council of Painting Trades*, 768 F.2d 1115, 1118 n.1 (9th Cir. 1985); *United Food and Commercial Workers Local Union No. 7R v. Safeway Stores*, 889 F.2d 940, 943-44 (10th Cir. 1989). Because there is no basis in the FAA to distinguish between workers who are covered by CBAs and those who are not, these holdings are de facto endorsements of a broad interpretation of the § 1 exclusion, and conflict with the "transportation workers" interpretation. Only three circuits have applied the "transportation workers" interpretation to CBA cases, and each has conflicting intra-circuit precedent on this point. *Compare Maryland Casualty Co. v. Realty Advisory Bd.*, 107 F.3d 979, 982 (2d Cir. 1997); *Virgin Islands v. United Indus. Workers*, 169 F.3d 172, 177 (3d Cir. 1999) (applying narrow interpretation of § 1 exclusion in CBA cases), *with Harry Hoffman Printing v. Graphic Communications Int'l Union*, 912 F.2d 608, 612 (2d Cir. 1990) (FAA "does not even apply to disputes involving CBAs"); *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1127 n.18 (3d Cir. 1969) (FAA is "inapplicable to appeals from labor arbitration awards due to the exclusion of 'contracts of employment' "); *Service Employees Int'l Union v. Office Center Services*, 670 F.2d 404, 407 n.6 (3d Cir. 1982) (dictum) ("serious question as to whether the applicability of the [FAA] to labor arbitration agreements retains any vitality in this circuit"); *Pritzker v. Merrill Lynch Pierce Fenner & Smith*, 7 F.3d 1110, 1120 (3d Cir. 1993) (appellants "correctly note that the FAA by its own terms does not apply to employment contracts"). *See Pryner v. Tractor Supply Co.*, 109 F.3d 354, 357 (7th Cir. 1997) (holding narrow interpretation applies to both individual contracts and CBAs but harmonizing conflicting cases by deciding that only *procedural* aspects of the FAA apply to CBAs, while *substantive* issues, including vacating and enforcing

awards, are determined by federal common law under LMRA § 301).

II. THE NARROW, "TRANSPORTATION WORKERS" INTERPRETATION CANNOT BE JUSTIFIED BY A GENERALIZED PRO-ARBITRATION POLICY

A. The "Transportation Workers" Interpretation Extends the FAA's Displacement of Traditional State Law, thereby Extending an Interpretation of the FAA that Five Justices of this Court Have Recognized as Erroneous

In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court held that § 2 of the FAA preempts state laws restrictive of arbitration. *Southland* further requires state courts to apply the substantive right created in FAA § 2, using the procedures set forth in FAA §§ 3 and 4. *See Southland*, 465 U.S. at 24 (O'Connor, J., dissenting).[8] In determining whether the FAA applies to employment contracts, this Court will necessarily decide whether these preemptive aspects of *Southland* will be extended to the employment setting.

" '[W]here . . . the field which congress is said to have preempted includes areas that have been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.' " *Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring) (*quoting English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990)). "To the extent that federal statutes are ambiguous, we do not read them to displace state law." *Allied-Bruce*, 513 U.S. at 292 (Thomas, J., dissenting); *accord Southland*, 465 U.S. at 18 (Stevens, J., concurring in part and dissenting in part) ("The exercise of state authority in a field traditionally occupied by state law will not be deemed preempted by a federal statute unless that was the clear and manifest

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[8] Therefore, petitioner in the case at bench could have asked the state court to stay the litigation pursuant to FAA § 3.

purpose of Congress"); *id.* at 21 ("[a] state policy excluding wage claims from arbitration . . . can be recognized without impairing the basic purposes of the federal statute").

Regulation of the employment relationship is such an area traditionally occupied by state law. *See Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 96 (1992) ("regulation of the workplace" is "a field traditionally occupied by the states"); *Colorado Anti-Discrimination Comm. v. Continental Air Lines*, 372 U.S. 714, 719 (1963) (regulation of employment relationship is area within "traditional powers" of states); *Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (labor relations within states' traditional police powers).

None of the post-*Southland* cases adopting the "transportation workers" exception, and broadly applying the FAA to most employment contracts, have so much as mentioned these preemption principles – another serious analytical flaw in those cases. Preemption principles dictate that the following question be addressed: In enacting the FAA with the exclusionary language in § 1, did Congress unambiguously intend to displace state laws regulating employment contracts? To ask the question is to answer it. The cases adopting the "transportation workers" interpretation have strained to do so, relying on ambiguous interpretive aids; even giving these cases the benefit of the doubt, they can hardly support the view that the FAA manifests a clear intent to preempt all state regulation of arbitration agreements in the employment setting. In any event, as shown above, Congress intended the FAA to exclude all employment contracts reachable by federal regulation, and therefore intended *not* to displace *any* state regulation of employment contracts.

It is also significant to the preemption question that *five current justices of this Court* have at one time or another specifically stated that *Southland* was wrongly decided. *See Southland*, 465 U.S. at 18-21 (Stevens, J., concurring in part and dissenting in part) (dissenting from proposition that § 2 of FAA preempts state statutes, as opposed to common-law rules, limiting enforceabilility of arbitration agreements for certain types of cases); 465 U.S. at 24 (O'Connor, J., joined by Rehnquist, J., dissenting) (*Southland* majority wrongly concluded that FAA § 2 created federal substantive rights that must be enforced in state courts); *Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring) (same); *id.* at 284-85 (Scalia, J., dissenting) ("Adhering to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes"); *id.* at 285 (Thomas, J., joined by Scalia, J., dissenting) ("In my view, the Federal Arbitration Act does not apply in state courts"). While undersigned amici respectfully submit that *Southland* was wrongly decided for the reasons stated in the above-cited dissenting and concurring opinions, *Southland*'s controversial holding was expressly reaffirmed in *Allied-Bruce* (despite the request, supported by 20 state attorneys general, that it be overruled), and in any event, the correctness of *Southland* as such is not raised in the issue on which certiorari is granted here. Nevertheless, the objections to it voiced by five current justices of this Court are hardly a recommendation for *extending* the effect of *Southland* even further.

The proper interpretation of the § 1 exclusion to exempt all employment contracts from FAA coverage would allow states to regulate, under their own contract law, the extent to which employment contracts should be subject to compelled arbitration. A number of states already have laws on the books that would do so. *See, e.g., Bungard v. Rural Mutual Ins. Co.*, 193 Wis. 2d 638, 537 N.W.2d 433 (Wis. App. 1995) (Wisconsin Arbitration Act (WIS. STATS. § 788.01) excluding employment contracts from enforcement provision, conflicts with, and is therefore preempted by, FAA); Grodin, *supra* note 2, at 18 (listing statutes). All these laws would be preempted (except for transportation workers) if the narrow interpretation were applied. *See Doctors' Assocs. v. Cassarotto*,

517 U.S. 681 (1996) (Montana statute requiring special notice for arbitration agreements preempted by FAA § 2); *Allied-Bruce*, 513 U.S. at 269, 282 (FAA § 2 preempts Alabama statute making pre-dispute arbitration agreement unenforceable); *Perry v. Thomas*, 482 U.S. 482 (1987) (FAA § 2 preempts California statute making arbitration agreements unenforceable as to statutory wage and hour claims). The National Conference of Commissioners on Uniform State Laws (NCCUSL) was considering addressing issues relating to adhesive arbitration agreements in its Revised Uniform Arbitration Act, but determined that "the preemptive effect of the Federal Arbitration Act,. . . . dramatically limits meaningful choices for drafters addressing adhesion contracts[.]" NCCUSL, *Adhesion Arbitration Agreements and the RUAA*, (last modified Aug. 23, 2000) <http://www.law.upenn.edu/bll/ulc/uarba/arbr0500.htm>. However, the federalism-based preemption principles stated above strongly support a broad construction of the § 1 exclusion, with the result that the traditionally state-regulated field of employment contracts would not be preempted.

B. Relying on a Generalized "Pro-Arbitration" Policy to Bootstrap the FAA to Coverage of Employment Cases Intrudes on the Role of Legislatures

Congress intended to exclude all employment contracts from FAA coverage, and therefore never intended to extend any "policy favoring arbitration" to employment contracts. It is no answer to this argument to say that "the strong federal policy in favor of arbitration requires a narrow reading of this section 1 exemption," *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997), because that policy does not apply.

Yet the lower courts adopting the narrow interpretation have all indulged in that circular reasoning. In doing so, the lower courts have made a sweeping policy determination that Congress specifically sought to avoid. In

1925, Congress was presented with objections to compelled arbitration of employment disputes pursuant to boilerplate arbitration provisions unilaterally imposed by employers in individual adhesion contracts. Rather than develop and consider these concerns through extended study and debate, Congress avoided the issue by immediately exempting workers' contracts altogether.

Since 1925, these issues have not disappeared, but have become far more complex. Numerous academic commentators have echoed Justice Stevens' warning that the "additional extension of the FAA" "as broadly encompassing disputes arising out of the employment relationship" is "erroneous" and would "clearly eviscerate[ ] the important role played by an independent judiciary in eradicating employment discrimination." *Gilmer*, 500 U.S. at 44 (Stevens, J., dissenting). Mandatory arbitration pursuant to arbitration agreements required by employers as a condition of employment raises great potential for unfairness, for undermining employee-protective legislation, and for sowing doctrinal confusion.[9]

Furthermore, extending mandatory arbitration under the FAA to employment disputes may also go a long way toward undermining the economy and efficiency of arbitration, relative to litigation, that led Congress to enact the FAA in the first place. The influx of employment and

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[9] *See, e.g.*, Lisa B. Bingham. *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 McGeorge L. Rev. 223 (1998); Paul D. Carrington and Paul H. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: the Yellow Dog Contract of the 1990s*, Denv. U. L. Rev. 1017 (1996); articles cited *supra* note 2.

Among other problems, mandatory arbitration of employment claims raises constitutional waiver issues which have never been adequately addressed in the courts. *See, e.g.*, Reuben, *supra* note 2, at 1019-43 (2000); Sternlight, *supra* note 2, at 53-82.

civil rights claims into the mandatory arbitration setting has placed great pressure on the institution of arbitration to permit increasing "due process" safeguards on arbitration, many of which – such as increased discovery – make it increasingly resemble litigation.[10] Some of this pressure has come from judicial decisions. *See, e.g., Cole*, 105 F.3d at 1479-87 (imposing due process safeguards).

Amici respectfully submit that the branch of government best suited institutionally to confront the policy questions Congress avoided in enacting the FAA – balancing the desirability of arbitration versus "the important role played by an independent judiciary" in resolving employment disputes – is Congress, not the courts. The courts should not arrogate this responsibility to themselves in the name of a statutory policy in favor of arbitration that was never intended to apply to employment contracts.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Court of Appeals for the Ninth Circuit.

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Respectfully submitted,

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[10] The "Due Process Protocol," trumpeted by the American Arbitration Association in its amicus brief to this court, is one example of such procedures. *See* Amicus Brief of Am. Arb. Assn. in Support of Pet. at 6-7.